

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YONKERS AND HEMPSTEAD REALTY, LLC	:	DETERMINATION
	:	DTA NO. 819336
for Revision of a Determination or for Refund of	:	
Real Estate Transfer Tax under Article 31 of the	:	
Tax Law for the Year 1999.	:	

Petitioner, Yonkers and Hempstead Realty, LLC, 7123 Ayrshire Lane, Boca Raton, Florida 33496, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the year 1999.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 19, 2003 at 1:00 P.M., with all briefs submitted by November 3, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Leon C. Baker, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether a conveyance of real property was properly excluded from the real estate transfer tax pursuant to Tax Law § 1405(b)(6) as a “mere change of identity or form of ownership or organization where there is no change in beneficial ownership.”

II. Whether penalty imposed under Tax Law § 1416(b) should be sustained.

FINDINGS OF FACT

1. On January 28, 2002, the Division of Taxation (“Division”) issued to petitioner, Yonkers and Hempstead Realty, LLC, a Notice of Determination which asserted \$21,800.00 in real estate transfer tax due, plus penalty pursuant to Tax Law § 1416(b) and interest.
2. Petitioner is a limited liability company owned by Leon C. Baker and Gloria Baker, husband and wife, with each having a 50-percent interest.
3. The assessment herein was issued in connection with the conveyance of certain commercial real property located at 2492 Central Park Avenue, Yonkers, New York, from Yonkers Realty Associates to petitioner on January 1, 1999. The consideration for the transfer was \$5,400,000.00 and consisted of the grantee’s taking title by either assuming a \$5,400,000.00 mortgage or by taking title subject to such mortgage.
4. A Real Estate Transfer Tax Return filed on February 16, 1999 in respect of the subject transfer claimed that the consideration for the conveyance was excluded, in full, from the real estate transfer tax as a mere change of identity or form of ownership or organization.¹
5. Yonkers Realty Associates (“the partnership”) was a real estate partnership which had been in existence since 1968. The partnership consisted of one general partner, Leon C. Baker, and several limited partners.² The partnership owned a fee interest in and earned rental income from commercial real estate located at 2492 Central Park Avenue, Yonkers, New York. In 1998, the mortgage on the partnership real property became due. The partnership needed financing to make the required payment on the mortgage, but unfavorable interest rates made obtaining such

¹ The return also claimed a continuing lien deduction in the full amount of the consideration. Such a deduction is not available for commercial property, and petitioner no longer makes this claim.

² Gloria Baker was not a partner of Yonkers Realty Associates.

financing unfeasible. The partnership therefore considered transferring its interest to the mortgagee in lieu of foreclosure, but the mortgagee, a qualified profit-sharing trust, did not look favorably upon the taxable rental income which would be accrued as a result of ownership, and thus did not want title to the property. The problem was resolved by an extension of the mortgage at a higher interest rate. This resolution increased the cost of owning the property, however, and effectively offset all net rental income from the property. It was determined, therefore, that final distributions to the partners would be made, the interests of the limited partners would be retired, the property would be transferred to a limited liability company owned by Leon C. Baker, and the partnership would be dissolved.

6. The partnership's 1999 New York partnership return, with an attached copy of its 1999 Federal partnership return, was received in evidence. These returns indicate that the partnership had 17 partners in 1999. Schedule K-1's for each partner were attached to the Federal return. In addition, New York schedule B's (Partner's Share of Modifications, Credits, Etc.) for each partner were attached to the New York return. The schedule K-1's listed distributive share items of income and loss to be reported on the respective partner's U.S. Individual Income Tax Return, Form 1040. The most significant of such items was identified as "unrecaptured section 1250 gain," which ranged from approximately \$68,000.00 to \$700,000.00 on the various K-1's. The K-1's also showed the partner's percentage of ownership of partnership capital "before change or termination," which ranged from about .5 percent to about 16 percent, and the percentage of such ownership at the end of the year. All partners had zero capital at the end of the year. The K-1's also reported distributions to partners during 1999 in amounts identical to those listed in a letter from Mr. Baker dated January 18, 1998 (*see*, Finding of Fact "7").

7. Leon C. Baker, as general partner of the partnership, sent a letter dated January 18, 1998 to the other partners of Yonkers Realty Associates which stated in relevant part:

The extension of the mortgage on the partnership's real estate to January 1, 1999 was consented to by more than two thirds of the limited partners.

In the past the partnership has made annual distributions in July, but there appeared to be no reason for delay now that operations have ceased. Accordingly, enclosed is a check for your final distribution

The letter lists distributions to the limited partners in accordance with their respective partnership interests. The total amount of such distributions is \$70,000.00.

8. Following a conciliation conference with the Division's Bureau of Conciliation and Mediation Services a conciliation order was issued on January 3, 2003 modifying the assessment to \$20,297.54 in tax due, plus penalty and interest. This modification was premised on a finding that Leon C. Baker had a 6.892 percent ownership interest in the partnership property at the time of the subject transfer. The source of this 6.892 percent figure is not in the record.

9. Mr. Baker had an 8.5242 percent ownership interest in the partnership at the time of the subject transfer to petitioner. The Division concedes that petitioner is entitled to a mere change of identity exclusion to the extent of this 8.5242 percent interest.

CONCLUSIONS OF LAW

A. The real estate transfer tax is "imposed on each conveyance of real property or interest therein" (Tax Law § 1402[a]). All conveyances are presumed subject to the tax (Tax Law § 1404[b]). While the grantor in the transaction is generally responsible for the payment of the transfer tax, where the grantor has failed to pay the tax, the grantee has the duty to pay the tax (Tax Law § 1404[a]).

B. Tax Law § 1405(b)(6) excludes from the real estate transfer tax “[c]onveyances to effectuate a mere change of identity or form of ownership or organization where there is no change in beneficial ownership.”

C. Petitioner asserts that at the time of the conveyance the interests of all limited partners had been retired and Leon C. Baker, as the sole remaining partner, owned 100 percent of the partnership’s property. Since Mr. Baker also owned 50 percent of the grantee in the transaction (i.e., petitioner), petitioner asserts that the mere change exclusion of Tax Law § 1405(b)(6) should apply with respect to 50 percent of the consideration. Petitioner further asserts that the remaining 50 percent of the consideration should be excluded pursuant to Tax Law § 1405(b)(4) as a bona fide gift to his wife, Gloria Baker, the other 50-percent owner of petitioner.

Petitioner’s case rests on the contention that the interests of the limited partners of the partnership had been retired at the time of the subject transfer. The record, however, does not support this contention. The 1999 partnership return indicates that there were 17 partners in 1999, all of whom had items of income and loss to be reported on their 1999 personal income tax returns. The partnership return also indicates that each partner had an interest in the partnership’s capital at the beginning of the year and that each partner received a distribution during the year. The 1999 partnership return is thus strong evidence that the partnership consisted of 17 members at the time of the subject transfer on January 1, 1999.

The letter dated January 18, 1998 is not, as petitioner asserts, “conclusive evidence” that the limited partners’ interests were retired at the time of the subject transfer. Even if, contrary to the 1999 return, the final distributions were made in January of 1998 as the date of the letter would suggest, the K-1’s clearly show that the limited partners each had an interest in the partnership’s capital at the beginning of 1999 and show items of income and loss for that year.

There is no explanation in the record as to why the 1999 partnership return would reflect such information if the limited partners' interests were retired in 1998.

Petitioner has thus failed to establish that Mr. Baker's interest in the partnership at the time of the subject conveyance was greater than 8.5242 percent (*see*, Finding of Fact "9"). Accordingly, petitioner has failed to establish entitlement to a mere change of identity exclusion greater than such 8.5242 percent interest.

Since petitioner has not established that Mr. Baker owned 100 percent of the partnership at the time of the subject conveyance, petitioner's contention that 50 percent of the transfer should be excluded from tax as a gift to Gloria Baker is moot. It should be noted, however, that the gift exclusion is restricted to conveyances "without consideration" (Tax Law § 1405[b][4]), while the subject conveyance had consideration of \$5,400,000.00.

D. The Division asserted penalty herein pursuant to Tax Law § 1416(b), which provides that a grantor or grantee "shall" be subject to a penalty if they fail to file a return or to pay any tax within the time required. This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1416[b]). Consistent with this statute, the Commissioner's regulations provide that penalty under Tax Law § 1416(b) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). In the instant matter, petitioner has offered no evidence of reasonable cause and has articulated no rationale for the cancellation of penalty. Accordingly, the imposition of penalty must be sustained.

E. The petition of Yonkers and Hempstead Realty, LLC is denied and the Notice of Determination dated January 28, 2000, as modified by the conciliation order dated January 3, 2003 and as further modified pursuant to Finding of Fact “9,” is sustained.

DATED: Troy, New York
March 18, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE